

## Ethiopia's Regulatory Regime on Advocates' Duty to Report Suspicious Transactions to Combat Money Laundering

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### Abstract

Anti-Money Laundering measures have various objectives including detecting crime by following the money trail and protecting the integrity of the financial system against abuse by criminals. Suspicious Transactions Report (STR) is one of the vehicles to achieve these objectives. The Ethiopian Financial Intelligence Service has received reports of suspicious transactions involving 9 Billion Birr within five months of 2014 E.C. (Sept. 2021 to August 2022). On the other hand, some argue that the obligation contravenes legally protected rights, such as confidentiality, the relationship of trust between lawyers and client, professional freedom of the lawyers and fair trial. Based on international and national legal instruments and scholarly works, the practice in Ethiopia and views of experts, this author argues that advocates' duty to report suspicious transaction is in line with legally protected rights due to the adverse impact of money laundering and the role of the professionals in combating money laundering through the bridge mechanism. The rights and privileges accorded to advocates and their clients are meant to protect legitimate interests of individuals, and cannot justify acts that conceal a crime, escape criminal liability or encourage impunity. The advocate's duty to report suspicious transactions provided under Proclamation No. 780/2013 is thus in line with the state's duty under the Palermo Convention and other international instruments.

### Key terms:

Duty to report · Money laundering · Predicate crime · Suspicious transactions

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**1. Introduction**

The term Money Laundering was first used in 1973 during the 'Watergate Scandal'. It describes 'the process of transforming illegal into legal assets'.<sup>1</sup> The definition of money laundering adopted by the United Nations Convention on Drugs and an EU-directive is incorporated into the national laws of Member States.<sup>2</sup> As Kacarba notes, money laundering refers to the

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**Frequently used acronyms:**

AML	Anti-Money Laundering
CFT	Combating the Financing of Terrorism
DNFBP s	Designated Non-Financial Businesses and Professions
ESAAMLG	The Eastern and Southern Africa Anti-Money Laundering Group
FATF	Financial Action Task Force
FIC/FIS	Financial Intelligence Centre/Financial Intelligence Service
ML	Money Laundering
STR	Suspicious Transaction Report

The term "Advocate" is used in this article because, it is used in the Federal Advocacy Service Licensing and Administration Proclamation, No. 1249/2021.

<sup>1</sup> Friedrich Schneider & Ursula Windischbauer (2010). Money Laundering: Some Facts, Economics of Security Working Paper Series, Economics of Security Working Paper 25, p. 4.

<sup>2</sup> Ibid.

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process of washing illegally acquired cash through the instrumentality of financial and other systems so that it appears to be legally acquired.<sup>3</sup>

In various legal and regulatory systems, the term money laundering is blended with other forms of financial and business crimes, and in some jurisdictions it is, *inter alia*, referred to as misuse of the financial system.<sup>4</sup> Thus various international organizations have vested interest in protecting the international financial system from adverse effect of the crime.<sup>5</sup> Misuse of financial system may refer to securities, digital currencies, credit cards, and traditional currency. It may also include terrorism financing and evasion of international sanctions.<sup>6</sup>

Daley states that money laundering shall be treated as a grave crime because of its impact on the nation's economy.<sup>7</sup> The IMF and the World Bank have estimated that illicit sources of money cover about 2 to 4 % of the world's GDP.<sup>8</sup> And according to the September 2020 Financial Integrity Panel report of the UN, money laundering comprises of around \$1.6 trillion per year, or 2.7% of global GDP.<sup>9</sup> It is a common problem faced by both developing and developed states.<sup>10</sup>

Legal regimes provide various mechanisms to combat the crime of money laundering; and advocates' duty to report suspicious transaction is one of

<sup>3</sup> Peter J. Kacarba (1991). "An In depth Analysis of the New Money Laundering Statute", *Akron Tax Journal*, Vol. 8, p. 2.

<sup>4</sup> Tom C. W. Lin (2016). "Financial Weapons of War", *Minnesota Law Review*, Vol. 100, p. 1383.

<sup>5</sup> See, for example, IMF, Financial System Abuse, Financial Crime and Money Laundering, Background Paper, Prepared by the Monetary and Exchange Affairs and Policy Development and Review Departments in Consultation with Legal and other Departments, Approved by Jack Boorman and Stefan Ingves, February 12, 2001. Available at <https://www.imf.org/external/np/ml/2001/eng/021201.pdf> accessed on 10 April 2021.

<sup>6</sup> Lin, *supra* note 4, p. 1400.

<sup>7</sup> Modelyn J. Daley (2000). "Effectiveness of United States and International Efforts to Combat International Money Laundering", *St. Louis Warsaw Transatlantic Law Journal*, p. 179.

<sup>8</sup> Killian J McCarthy (2013). "Why Do Some States Tolerate Money Laundering? On the Competition for Illegal Money" in Unger & van der Linde, eds, p. 129.

<sup>9</sup> UN, Department of Economic and Social Affairs, Report on Tax abuse, money laundering and corruption plague global finance, 24 September 2020, New York. Available at: <https://www.un.org/development/desa/en/news/financing/facti-interim-report.html> accessed on 19 April 2020

<sup>10</sup> IMF, Germany: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism, IMF Country Report No. 10/78, (2010).

those mechanisms. This article examines the compatibility and necessity of advocates' duty to report suspicious transactions in line with legally protected rights in Ethiopia. For this purpose: the reconcilability of advocates' duty to report suspicious transaction with legally protected rights, the extent of adherence to the duty by advocates, the prevailing practice of advocates' duty to report suspicious transaction in Ethiopia, and the effect of advocates' duty to report suspicious transaction on the legally protected rights are examined.

The doctrinal dimension of the research method is used to analyze existing statutory provisions and literature on the area. Anti-money laundering laws are used as the primary sources of the doctrinal research while FATF Recommendations, scholarly literature and commentaries are used as secondary sources. The non-doctrinal part of the research has employed interviews, questionnaires and Focus Group Discussions with advocates, public prosecutors, academics, and personnel of the Ethiopian Financial Intelligence Service (FIS) as primary sources of the empirical data.

The next section examines the normative and institutional frameworks<sup>11</sup> for fighting money laundering. The issues of anti-money laundering efforts and STR duty are discussed in the third section. Sections 4, 5 and 6 examine advocates' duty to report suspicious transaction as a means to combat money laundering in Ethiopia followed by a conclusion and brief remarks on the way forward.

## **2. The Normative and Institutional AML Framework**

### **2.1 Anti-money laundering (AML) conventions**

The *first* instrument<sup>12</sup> on crime prevention related with AML at the international arena is the Vienna Convention of 1988.<sup>13</sup> It is intended to prevent illicit Traffic in Narcotic Drugs and Psychotropic Substances. It

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<sup>11</sup> For detailed explanation, please see: Biniam Shiferaw (2011). Money Laundering and Countermeasures: A Critical Analysis of Ethiopian Law with Specific Reference to the Banking Sector, LLM thesis, Addis Ababa University, Faculty of Law, pp. 23-40. Available at:

<http://etd.aau.edu.et/bitstream/handle/123456789/17863/Biniam%20Shiferaw.pdf?sequence=1&isAllowed=y>, accessed on 10 Feb 2021.

<sup>12</sup> There are other drug control conventions but those conventions were regarded as inadequate to attain the intended purpose. The Single Convention on Narcotic Drugs of 1961 and the 1971 Convention Psychotropic Substances can be mentioned as example.

<sup>13</sup> UN Economic and Social Council (ECOSOC), United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 19 December 1988, (hereafter the Vienna Convention)

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focuses on “the importance of the technical records on international drug traffickers of the International Criminal Police Organization and their use by that organization for the circulation of descriptions of such traffickers”.<sup>14</sup> The Convention does not expressly refer to Money Laundering, but the predicate crime of drug trafficking which is covered under Article 3 of the Convention.<sup>15</sup> Ethiopia acceded to the Convention on 11 October 1994.<sup>16</sup>

The *second* international instrument is the Palermo Convention<sup>17</sup> which aims at promoting ‘cooperation to prevent and combat transnational organized crime more effectively’.<sup>18</sup> It directs member states to institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and other bodies particularly susceptible to money-laundering, to deter and detect all forms of money-laundering; and it gives due emphasis to requirements that include customer identification, record-keeping and the reporting of suspicious transactions.<sup>19</sup>

Moreover, the Palermo Convention envisages administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering.<sup>20</sup> Ethiopia is a member state to the Convention and its protocols, but does not accept the jurisdiction of the International Court of Justice which is provided under Article 15(2) of the Protocol.<sup>21</sup>

In addition to the Vienna and Palermo conventions, the Financial Action Task Force (FATF) is the major ‘policymaking’ body to fight terrorist financing and money laundering crime through legislative and regulatory reforms. FATF has chain of regulations to combat money laundering, and they were established in 1990; and with the change in financial systems and nature of the crime, they have been updated in 1996 and 2003. FATF embodies 40

<sup>14</sup> Id. Res. 1.

<sup>15</sup> Id. Art. 3.

<sup>16</sup> UN, Treaty Collection, available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-19&chapter=6&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en) accessed on 25 April 2021.

<sup>17</sup> UN General Assembly, United Nations Convention against Transnational Organized Crime: resolution / adopted by the GA, 8 January 2001, A/RES/55/25, (hereinafter referred as the Palermo Convention) available at: <https://www.refworld.org/docid/3b00f55b0.html> accessed on 19 May 2021.

<sup>18</sup> Id. Art. 1.

<sup>19</sup> Id. Art. 7 (a)

<sup>20</sup> Id. Art. 7 (b)

<sup>21</sup> UN, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, United Nations, Treaty Series, vol. 2237, p. 319; Doc. A/55/383.

recommendations (in 1990 to 2001) and nine recommendations (in 2001 to 2004), i.e. a total of 49 recommendations.<sup>22</sup> The Recommendations of FATF are segmented into four areas: (i) the general framework of the recommendations; (ii) improvements in the national legal system; (iii) enhancement of the role of the financial system; and (iv) strengthening international cooperation.<sup>23</sup>

## 2.2 FATF black list and grey list

The “anti-money laundering campaign calls for international co-operation between all regions and countries.”<sup>24</sup> There is an argument that the FATF is currently more concerned with gathering information than forcing countries to enact specific regulations.<sup>25</sup> But, realities on the ground show that the black list scheme of the institution, for example, is aimed at forcing states to adhere to the principles prescribed by FATF and its members have influence on non-members, e.g. in the case of the “dependent, associate or otherwise connected territories of FATF members”.<sup>26</sup>

The FATF Blacklist is a term used by the media, which is officially called as ‘call for action’ nations by the FATF. The FATF updates the blacklist regularly, adding or deleting entries.<sup>27</sup> The blacklist is updated on October 27, 2023.<sup>28</sup> For all countries identified as high-risk, the FATF calls on all members and jurisdictions “to apply enhanced due diligence, and in the most serious cases, countries are called upon to apply counter-measures to protect the international financial system from the on-going money laundering,

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<sup>22</sup> Muhammad Usman Kemal (2014). “Anti-money laundering regulations and its effectiveness”, *Journal of Money Laundering Control*, Vol. 17, Issue 4, p. 417.

<sup>23</sup> FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, FATF, Paris, France, (2012-2020) (hereafter cited as FATF Recommendations).

<sup>24</sup> Jiang Zhuqing, Laundering Legislation to Spread Net Wider, China Daily, quoting Cai Yilian, Deputy Director of the Anti-money Laundering Bureau under the People’s Bank of China, (Sept. 30, 2005).

<sup>25</sup> S. Selena Nelson (2007). “Regulating Money Laundering in the United States and Hong Kong: A Post 9-11 Comparison”, *Washington University Global Studies Law Review*, Vol. 6, Issue 3, p. 724.

<sup>26</sup> Johannes Dumbacher (1995). “The Fight against Money Laundering”, *Intereconomics*, Vol. 30, Issue 4, p. 183.

<sup>27</sup> FATF Activities, available at <https://www.fatf-gafi.org/about/whatwedo/> accessed on 20 May 2021.

<sup>28</sup> “Black and grey” lists (FATF):  
<https://www.fatf-gafi.org/en/countries/black-and-grey-lists.html>  
Last accessed: 20 November, 2023

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terrorist financing, and proliferation financing risks emanating from the country”.<sup>29</sup>

There are also FATF Grey-lists, officially referred as Jurisdictions under Increased Monitoring. Countries on the FATF grey list represent a much higher risk of money laundering and terrorism financing but have formally committed to working with the FATF to develop action plans that will address their AML/CFT deficiencies. The list under this category is periodically updated.<sup>30</sup>

### **2.3 Basel Committee on Banking Supervision and various stakeholder groups**

In 1988 the Basel Committee adopted a Statement of Principles which required banks to verify and establish the true identity of their customers. Although the principles, as the name implies, do not have binding nature, they have influenced regulatory frameworks. Basic documents issued by the Basel Committee include (i) Basel Statement of Principles, 1988, (ii) Core Principles for Effective Banking Supervision, 1999, (iii) Customer Due Diligence for Banks, 2001<sup>31</sup>, and (iv) General Guide to Account Opening and Client Identification, 2003. They mainly aim at regulating Money Laundering channels by restricting the Banking Sector.

The Basel Committee underlines the need for caution by banks so that criminals do not use them as facilitator for ill-gotten money.<sup>32</sup> The Principles are aimed at protecting the reputation of banks against criminals and ensure the public confidence towards them.<sup>33</sup> Thus, the Committee has outlawed anonymous bank accounts.

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<sup>29</sup> FATF Countries, Available at <https://www.fatf-gafi.org/countries> accessed on 20 May 2021

<sup>30</sup> “Black and grey” lists, *supra* note 28.

<sup>31</sup> As provided under introductory remarks of the Basel Committee on Banking Supervision “KYC is most closely associated with the fight against money-laundering, which is essentially the province of the Financial Action Task Force (FATF)”, See Bank for International Settlements, Basel Committee on Banking Supervision: Due Diligence for Banks, (2001), p. 2.

<sup>32</sup> Shawgat S. Kutubi (2011). “Combating Money-Laundering by the Financial Institutions: An Analysis of Challenges and Efforts in Bangladesh”, *World Journal of Social Sciences*, Vol. 1. No. 2. p. 38.

<sup>33</sup> Mark Pieth and Gemma Aiolfi (2004). *A Comparative Guide to Anti-Money Laundering: A Critical Analysis of Systems in Singapore, Switzerland, the UK and the USA* (Edward Elgar Publishing Limited), p. 360.

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Other stakeholder groups include the Egmont Group, the Wolfsberg Group, the International Monetary Fund and the World Bank framework, and the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG).

*The Egmont Group* (1995)<sup>34</sup> is a global semi-official organisation of Financial Intelligence Units whose secretariat is currently in Toronto. Its membership has grown from 12 members in 1995 to 101 in July 2005, 164 in 2020<sup>35</sup> and to 174 as of November 2023.<sup>36</sup> It is a global enforcement mechanism linking Suspicious Activity Reports received by financial intelligence agencies in eighty-four countries.<sup>37</sup>

Dakar (Senegal) has hosted the 2023, annual Egmont Group Working and Regional Group Meeting (held from January 30 to February 3). 287 delegates of members and 12 observers participated the meeting. It was aimed at enhancing the capacity of the members, advancing information sharing and working toward the achievement of the group's "development mission, cooperation, and sharing of expertise".<sup>38</sup>

*The Wolfsberg Group* is a non-governmental association established by thirteen global banks on 30<sup>th</sup> October 2000.<sup>39</sup> Currently, it is an association of 12 global banks,<sup>40</sup> as of 12 June 2023 Credit Suisse Group AG has been acquired by UBS Group AG<sup>41</sup> (one of the member to Wolfsberg Group). The group is established with the objective of developing policies on financial industry standards for anti-money laundering, know your customer,

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<sup>34</sup> For more information, see <http://www.egmontgroup.org> accessed on 26 April 2021.

<sup>35</sup> Michael Levi (2020). "Evaluating the Control of Money Laundering and Its Underlying Offences: the Search for Meaningful Data", *Asian Journal of Criminology*, Vol. 15, p. 306.

<sup>36</sup> The Egmont Group, About The Egmont Group, available at <https://egmontgroup.org/about/#:~:text=The%20Egmont%20Group%20is%20a,effort%20to%20counter%20terrorist%20financing>. Accessed on 13 Nov. 2023.

<sup>37</sup> Allison S. Bachus (2004). "From Drugs to Terrorism: The Focus Shifts in the International Fight against Money Laundering after September 11, 2001", *Ariz. J. Int'l & Comp. L.*, Vol. 21, p. , 859–60

<sup>38</sup> Egmont Group, Communiqué – 2023 Egmont Group Working and Regional Group Meeting, available at: <https://egmontgroup.org/news/communique-2023-egmont-group-working-and-regional-group-meeting/> accessed on 14 November 2023.

<sup>39</sup> Financial leaders training center, Wolfsberg Payment Transparency Standards. Available at: <http://fltctraining.com/the-new-wolfsburg-payment-transparency-standards-to-aml-compliance-officers> accessed on 20 May 2021.

<sup>40</sup> <https://wolfsberg-group.org/> accessed on 15 November 2023.

<sup>41</sup> *Credit Suisse* Group AG, Latest up-date on the acquisition by UBS, available at <https://www.credit-suisse.com/about-cs/en.html> accessed on 15 November 2023.

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and counter terrorist financing.<sup>42</sup> The Wolfsberg Group also serves as a collective action group in the field of anti-corruption<sup>43</sup> along with its Anti-Money Laundering<sup>44</sup> activities.<sup>45</sup>

The International Monetary Fund and the World Bank framework are among the stakeholders because the role of these institutions includes, but not limited to, endorsing the FATF standards.<sup>46</sup> These institutions require borrowing countries to adopt and adhere to FATF standards. Moreover, the IMF and the WB have:

agreed to adopt a more comprehensive and integrated approach to conducting assessments of compliance with international standards for fighting money laundering and terrorist financing in member countries, and to step up the delivery of technical assistance to those countries whose financial systems are most at risk.<sup>47</sup>

*The Eastern and Southern Africa Anti-Money Laundering Group* (ESAAMLG) is among regional FATF style Anti-Money Laundering institutions. In September 2013 Ethiopia has been accepted as a full member of the Group. As part of the membership process, the Financial Intelligence Service/FIS of Ethiopia (previously called the Financial Intelligence Center/FIC) participated in mutual evaluation with the assistance of the World Bank and ESAAMLG to assess the country's compliance with international AML/CFT standards.<sup>48</sup> Currently, 20 countries are members to the institution and it has various groups of regional and international observers.<sup>49</sup>

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<sup>42</sup> Wolfsberg Website, <https://www.wolfsberg-principles.com/> accessed on 24 May 2021.

<sup>43</sup> Wolfsberg Group, Wolfsberg Anti-Bribery and Corruption (ABC) Compliance Programme Guidance (2017).

<sup>44</sup> Wolfsberg Group, Wolfsberg Anti-Money Laundering Principles for Correspondent Banking, (2014).

<sup>45</sup> Fritz Heimann & Mark Pieth (2018). *Confronting Corruption: Past Concerns, Present Challenges, and Future Strategies* (Oxford University Press,). pp. 225 *et seq.*

<sup>46</sup> Biniam, *supra* note 11, p. 31.

<sup>47</sup> IMF, Press Release: IMF, World Bank Enhance Efforts at Combating Money Laundering, Terrorist Financing, Press Release No. 04/70, 04 April 2004.

<sup>48</sup> Liat Shetret *et al.*, *Tracking Progress: Anti-Money Laundering and Countering the Financing of Terrorism in East Africa and the Greater Horn of Africa*, Global Center on Cooperative Security, March 2015, p.23.

<sup>49</sup> ESAAMLG, who we are, available at <https://www.esaamlg.org/index.php/about>, accessed on 16 November 2023.

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Ethiopia has ratified various regional and international instruments that directly support its AML/CFT regime. These instruments include: the UN transnational organized crime Convention, UN Vienna Convention against drugs and psychotropic substances and related protocols, Organization of African Unity anti-corruption conventions, IGAD mutual legal assistance convention, IGAD extradition convention, and the UN action plan that committed Ethiopia to implement UN Security Council Resolutions 1267 and 1373.<sup>50</sup>

### 3. Anti-Money Laundering Efforts and STR

#### 3.1 Overview of FATF's role in AML efforts

Financial Action Task Force (FATF) was formed by the G-7 Countries in 1989 and it is an intergovernmental body whose purpose is to develop and promote an international response to combat money laundering.<sup>51</sup> FATF is a policy-making body that brings together legal, financial, and law enforcement experts to achieve national legislation and regulatory Anti-Money Laundering (AML) and Combating the Financing of Terrorism (CFT) reforms.<sup>52</sup>

The FATF requires states to criminalize money laundering on the basis of the Vienna Convention and the Palermo Convention.<sup>53</sup> To this end, countries are required to “apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences”.<sup>54</sup>

FATF has developed 40 recommendations on money laundering and 9 special recommendations regarding terrorist financing (referred to as the FATF forty plus nine recommendations). The recommendations have been updated in November 2023.<sup>55</sup> Currently, the FATF is “developing updated

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<sup>50</sup> Tu'emay Aregawi Desta, *The Anti-Money Laundering and Countering Terrorist Financing Regime in Ethiopia*, Center on Global Counterterrorism Cooperation, (February 2013).

<sup>51</sup> Usman W. Chohan (2019). “The FATF in the Global Financial Architecture: Challenges and Implications”, *CASS Working Papers on Economics & National Affairs*, EC001UC.

<sup>52</sup> Id., p. 5.

<sup>53</sup> Ethiopia's accession to the Palermo Convention is on 22 June 2012. See full list of states and status at:

[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en) accessed on 20 May 2021.

<sup>54</sup> FATF Recommendations, Recommendation No. 3.

<sup>55</sup> The FATF Recommendations as Updated in November 2023, available at <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html> accessed on 17 November 2023.

risk-based guidance on Recommendation 25 on Beneficial Ownership and Transparency of Legal Arrangements". It is aimed at reflecting on the February 2023 revisions to Recommendation 25 and complementing the existing guidance on Recommendation 24 on legal persons.<sup>56</sup> The revised guidance is released for public consultation and it will be finalized on the FATF Plenary meeting planned to be held in February 2024.<sup>57</sup>

FATF assesses each member country under its published reports. Countries evaluated as not being sufficiently compliant with such recommendations may become subject to financial sanctions<sup>58</sup> by various institutions. The FATF has three primary functions with regard to money laundering: the first is monitoring members' progress in implementing anti-money laundering measures; second, reviewing and reporting on laundering trends, techniques, and countermeasures, and third promoting the adoption and implementation of FATF anti-money laundering standards globally.<sup>59</sup>

### 3.2 Efforts of states against AML and suspicious transactions

In terms of anti-money laundering regulations, countries have (in the last decades) been engaged in schemes aimed at preventing the flow of ill-gotten gains and legitimate capital towards funding terrorist and enemy war efforts.<sup>60</sup> For the effective implementation of those regulations and to combat illicit movement of money, financial institutions, such as banks, insurers, and securities are interested in active engagement.<sup>61</sup>

Financial institutions are required to implement group-wide programmes against money laundering and terrorist financing, including policies and procedures for sharing information within the group for AML/CFT purposes.<sup>62</sup> Moreover, other non-financial institutions referred to as

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<sup>56</sup> FATF, Outcomes FATF Plenary, 25-27 October 2023.

<sup>57</sup> Ibid; see also Public Consultation - FATF Risk-Based Guidance on Recommendation 25, available at <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/R25-Public-Consultation-Oct-23.html> accessed on 16 November 2023.

<sup>58</sup> FATF, "High-risk and non-cooperative jurisdictions", (23 June 2017). Available at [www.fatf-gafi.org](http://www.fatf-gafi.org) accessed on 11 Feb. 2021.

<sup>59</sup> Mark T. Nance (2018). "Re-thinking FATF: an experimentalist interpretation of the Financial Action Task Force", *Crime Law Social Change*, Vol. 69, pp. 138–139.

<sup>60</sup> Richard K. Gordon (2011). "Losing the War against Dirty Money: Rethinking Global Standards on Preventing Money Laundering and Terrorism Financing", *Duke J. Comp. & Int'l Law*, Vol. 21, p. 505.

<sup>61</sup> Biniam, *supra* note 11, p. 1; See also Kalkidan Misganaw (2020). "Anti-Money Laundering Law in Ethiopia: Issues of Enforcement with specific Reference to Banks", *Mizan Law Review*, Vol. 14, No. 1, p. 31.

<sup>62</sup> Id, Recommendation No. 10, 11, 12, 15, 17, 18, 22 and 23.

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designated non-financial businesses and professions (DNFBPs), such as advocates, dealers in precious metals, dealers in precious stones, notaries, casinos, real estate agents and trust and company service providers are subjected to the measures provided for combating of Money Laundering and Financing of Terrorism.<sup>63</sup>

The FATF and other related international legal instruments provide various mechanisms such as the requirement of customer due diligence (CDD), record-keeping duty, know your customer and suspicious transactions reporting (STR) as a mechanism to combat the crime. The mechanisms placed to combat money laundering are intended to mitigate its impact on: the legitimate private sector, integrity of financial institutions, rule of law, democracy and social well-being of the world in general and the countries in particular.<sup>64</sup> Ethiopia has enacted various laws to this effect as highlighted in Section 4.

### **3.3 Arguments regarding the duty of advocates to report suspicious transactions**

The anti-money laundering framework is divided into four categories: (a) public sector; (b) private sector; (c) a bridging mechanism; and (d) international cooperation.<sup>65</sup> The duty of advocates to report suspicious transaction relating to money laundering is considered as an integral part of anti-money laundering efforts through the private sector and a bridging mechanism to combat money laundering. Moreover, reporting a crime manifests civic allegiance in a prudent community.

Many jurisdictions require advocates to adhere to specific obligations provided under laws and regulations. One of these requirements is the obligation to conduct appropriate due diligence concerning their clients. This is aimed at identifying possible acts of money laundering. If there is suspicious transaction, they are also required to report to designated authority

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<sup>63</sup> FATF Recommendations, Recommendation No. 22 and 23.

<sup>64</sup> John McDowell & Gary Novis (2001). "The Consequences of Money Laundering and Financial Crime, Economic Perspectives", *An Electronic Journal of the U.S. Department of State*, Vol. 6, No. 2, p. 6.

<sup>65</sup> William C. Gilmore (2004), *Dirty Money: The evolution of international measures to counter money laundering and the financing of terrorism*, 3<sup>rd</sup> edn, Council of Europe, pp.19-23 and pp. 93-94; Hans-Jorg Albrecht (1997), "The Money Trail, Developments in Criminal Law, and Research Needs: An Introduction", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 5, (1997), pp.193-195; See also V. Mitsilegas (2003), *Money Laundering Counter-Measures in the European Union: A New Paradigm of Security Governance versus Fundamental Legal Principles*, pp.8-14.

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in that particular state, mainly to Financial Intelligence Units.<sup>66</sup> However, this requirement is only applicable to some identified activities under the law, such as when an advocate or firm –in the course of business– receives funds as a deposit or investment or to settle a real estate transaction.<sup>67</sup> This reporting duty is not free from debates among scholars who argue against and in support of the requirement.

Several countries have subjected advocates, notaries and other independent legal professionals to play roles in anti-money laundering measures.<sup>68</sup> Under these legal regimes, advocates are required to make suspicious transaction reports (STRs). Ethiopia pursues FATF's classification of advocates, notaries and other independent legal professionals as designated non-financial businesses and professions (DNFBPs). Hence, the Ethiopian law requires advocates to report suspicious transactions.<sup>69</sup>

Legal professionals' duty to report suspicious transactions has been a subject of argument for various lawyers of different jurisdictions.<sup>70</sup> Critics against this requirement contend that the obligation is contrary to: legal professional privilege, the duty of confidentiality, professional freedom of the lawyers and fair trial rights.<sup>71</sup> On the other hand, others have argued that confidentiality should not be raised as a defence for money laundering activities and lawyers should not be allowed to keep the criminal activities undisclosed under the guise of professional secrecy.<sup>72</sup>

Carmona argues that the well-accepted principles of confidentiality commitments and rules on legal privileges make such an initiative –of making lawyers a partner in the fight against money laundering and terrorist

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<sup>66</sup> The International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe, *A Lawyer's Guide to Detecting and Preventing Money Laundering*, October 2014.

<sup>67</sup> FATF (2020), Recommendation 22 (d).

<sup>68</sup> Marshet T. Tessema (2018). "A Juxtaposition of Legal Professionals Reporting and Confidentiality Duties: Gatekeepers for Launderers or Watchdogs?" *Higawinet Journal*, Vol. 1.

<sup>69</sup> The AML/CFT Proclamation, Art. 17.

<sup>70</sup> P. D. Paton (2010). "Cooperation, Co-option or Coercion? The FATF Lawyer Guidance and Regulation of the Legal Profession", *Journal of the Professional Lawyers*, p. 168. Cited in Marshet, *supra* note 68, p. 4.

<sup>71</sup> Nathanael Tilahun Ali (2019). "States' Varied Compliance with International Anti-money Laundering Standards for Legal Professionals", *Nordic Journal of International Law*, Vol. 88, p. 286.

<sup>72</sup> Marshet, *supra* note 68.

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financing– unattainable.<sup>73</sup> Nathanael, on the other hand, expresses the need for due attention to “global security governance”<sup>74</sup> and the risk that undermining the role of advocates can adversely affect the application of the FATF recommendation on the issue.<sup>75</sup> He states various judicial rulings as an evidence for his argument.<sup>76</sup>

Nathanael indicates cases<sup>77</sup> that show preference to the legally protected rights and less successful cases from Belgium,<sup>78</sup> France,<sup>79</sup> and the UK,<sup>80</sup> as an indication for preference for STR. According to Mesay, obliging advocates to make STR is a balance between “the classic concept of legal professional privilege and the public interest”.<sup>81</sup>

Marshet admits the negative effect of STR against the duty of confidentiality. But, he considers STR as a necessary evil to combat the crime of money laundering and he argues that the law has exempted advocates from STR when the communication is connected to proceedings. Marshet notes that the law confines the applicability of the duty to transactions itemised under the law.<sup>82</sup> Beyond the themes raised in these academic works, Sections 4 and 5 below deal with the practice on the ground by focusing on the Ethiopian context.

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<sup>73</sup> Cheselden George V. Carmona, *Requiring Lawyers to Submit Suspicious Transaction Reports: Implementation Issues and Current International Trends* (September 27, 2007). Available at <http://dx.doi.org/10.2139/ssrn.2378685> accessed on 25 May 2021.

<sup>74</sup> Nathanael Tilahun, *supra* note 71, pp. 306-307

<sup>75</sup> Nathanael Tilahun, “Legal Professionals as Dirty Money Gatekeepers: the Institutional Problem”, in Katie Benson, Colin King, and Clive Walker (eds.), *Assets, Crimes, and the State: Innovation in 21<sup>st</sup> Century Legal Responses*, Transnational Criminal Justice Series, Milton Park/New York, Routledge, (2020), pp. 5-6.

<sup>76</sup> *Jamaican Bar Association v. The Attorney General and General Legal Counsel* [2014] JMSC Civ. 179; *Nigeria Bar Association v. Attorney General of the Federation & Central Bank of Nigeria*, reported in N. Ahiauzu (2016). “Applicability of anti-money laundering laws to legal practitioners in Nigeria: NBA v. FGN & CBN”, *Journal of Money Laundering Control*, Vol. 19, p. 329.

<sup>77</sup> *Canada (Attorney General) v. Federation of Law Societies of Canada* [2015] SCC 7, 1 S.C.R. 401

<sup>78</sup> *Ordre des barreaux francophones et germanophone and Others v. Conseil des ministres*, European Court of Justice, Case C-305/05, Judgment of 26 June 2007.

<sup>79</sup> *Michaud v. France*, 6 December 2012, ECtHR, App. No. 12323/11.

<sup>80</sup> *Bowman v. Fels* [2005] EWCA (Civ) 226, paras.41–42.

<sup>81</sup> Mesay Tsegaye, *The Scope of Legal Professional Privilege & the Role of Lawyers in AML/CFT- The Case of Ethiopia*, Abyssinia Law, Blog Posts, p. 20.

<sup>82</sup> Marshet, *supra* note 68.

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#### 4. The Criminalization of Money Laundering in Ethiopia

Ethiopia is experiencing alarming challenges related with illicit financial flow. According to GFI's (Global Financial Integrity) estimations, between 2005 and 2014, an average of 1.259 billion to 3.153 billion US dollars left Ethiopia as Illicit Financial Flow (IFFs) every year. This is equivalent to: 11% to 29% of the country's total trade,<sup>83</sup> 40% to 97% of the total aid inflows to the country;<sup>84</sup> and according to IMF report it comprises about 10% to 30% of the government's total revenue.<sup>85</sup> If there were no such great rate of capital flight, "poverty would have been reduced by about 2.5 percentage points in the last decade".<sup>86</sup> This illicit financial flow and capital flight is being facilitated by corruption, diplomatic channels, price transferring through over-invoiced products, informal remittance systems<sup>87</sup> and Trade mis-invoicing<sup>88</sup>

Considering these facts and deficiencies under the legal regime, Ethiopia was listed under the black-list of FATF. The FATF public statement of 28 October 2011 considered Ethiopia as one of the 9 countries identified as "jurisdictions that have strategic deficiencies" and expressed its readiness to work with them "to address those deficiencies that pose a risk to the international financial system."<sup>89</sup> FATF's black list shows states that "have not made sufficient progress in addressing the deficiencies or have not committed to an action plan developed with the FATF to address the deficiencies."<sup>90</sup>

After the first designation under the black-list of FATF, Ethiopia was listed again as high-risk and non-cooperative country, not committed to an action

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<sup>83</sup> Global Financial Integrity. "Illicit Financial Flows to and from Developing Countries", (2017).

<sup>84</sup> OECD. "Development Aid at a Glance: Statistics by Region", (2016).

<sup>85</sup> Roberto Martinez B. Kukutschka (2018). *Illicit financial flows in Ethiopia*, Transparency International, p. 5.

Available at: <https://www.u4.no/publications/illicit-financial-flows-in-ethiopia.pdf>

<sup>86</sup> Ibid.

<sup>87</sup> According to the International Organization on Migration (IOM), as much as 78% of the money sent to the country as remittances is sent through informal channels. See International Organization for Migration, *Scaling up formal remittances to Ethiopia*, Brussels (2017).

<sup>88</sup> Kukutschka, *supra* note 85, p. 6.

<sup>89</sup> FATF Public Statement, 28 October 2011.

<sup>90</sup> Ibid.

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plan, on 16 February 2012,<sup>91</sup> on 23 June 2013,<sup>92</sup> on 18 October 2013<sup>93</sup> and 14 February 2014.<sup>94</sup>

In 2012 Ethiopia was identified as a “fast-growing economy and a country of primary concern vulnerable to money laundering and financing of terrorism activities.”<sup>95</sup> This vulnerability for Money-Laundering mainly emanated from being a “hub for cross-border trade in East Africa and the Greater Horn of Africa region.”<sup>96</sup> It is to be noted that reducing illicit financial and arms flow is one of the major objective under Goal 16.4 of the United Nations’ Sustainable Development Goals planned to be achieved by 2030.<sup>97</sup>

The 1957 Penal Code of Ethiopia had no provision that expressly refers to the act of money laundering.<sup>98</sup> Article 684 of the Criminal Code of 2004 was the first steep to explicitly criminalize the act.<sup>99</sup> Article 684 of the Code defines money laundering as a money or property derived from corruption, drug trafficking, illegal arms dealings and other crimes indicated under various provisions of the code involving crimes related with money or property.<sup>100</sup> Any similar offence is criminalized if the offender disguises its source through investment, transfer or remission.

A separate and comprehensive legal instrument was enacted in 2009 (AML and CFT proclamation) to address the major issues related with the offence.<sup>101</sup> The Financial Intelligence Center (FIC, currently renamed as Financial Intelligence Service) has been established under Regulation Number 171/2009.<sup>102</sup> The Center is empowered to collect, receive, store, survey,

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<sup>91</sup> FATF Public Statement, 16 Feb 2012.

<sup>92</sup> FATF Public Statement, 21 June 2013.

<sup>93</sup> FATF Public Statement, 18 October 2013.

<sup>94</sup> FATF Public Statement, 14 February 2014.

<sup>95</sup> Shetret *et al.*, *supra* note 48, pp. viii-ix

<sup>96</sup> *Id.* p. ix

<sup>97</sup> UNODC, *UNODC and the Sustainable Development Goals*. Vienna, (2015).

<sup>98</sup> The 1957 Penal Code made no reference to the crime of Money Laundering under its provisions but predicate crimes, such as corruption. See The Penal Code of Ethiopia 1957, Neg. Gaz. No. 158 of 1957.

<sup>99</sup> Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, Proc. No. 414/2004, Fed. Neg. Gaz., Year 10, No. 58 Art. 684.

<sup>100</sup> The FDRE Criminal Code, Arts. 243 (2) (3), 262(1)(2), 455(2), 506 (3) (4), 507-509, 510 (2), 511(2)(3)(5) and 512.

<sup>101</sup> Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation, Proc. No. 657/2009, Fed. Neg. Gaz. Year. 16, No. 1. 2009..

<sup>102</sup> The Financial Intelligence Center Establishment Council of Minster Regulation, 2009, Reg. No 171/2009, Fed. Neg. Gaz., Year 16, No. 5. (hereinafter referred as the FIC Establishment Regulation)

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analyze and disseminate information concerning suspected money laundering and financing of terrorism; enhance public awareness and understanding of matters related to money laundering and financing of terrorism, among others.<sup>103</sup>

The FIC began operations in 2010 “as the central authority for handling money laundering, terrorist financing, and other related matters in the country”. Following the FIC establishment regulation, the National Bank of Ethiopia issued the Customer Due Diligence Directive No. 46/2010 and instructed all financial institutions to implement it.<sup>104</sup> Currently, Proc. 657/2009 and Directive NBE CDD No. 046/2010 are repealed by Proclamation No. 780/2013<sup>105</sup> and AML/CTF Compliance FIC Directive No. 01/2014. Regulation Number 490/2022 also repealed the FIC establishment regulation with the effect of changing its name to FIS.<sup>106</sup>

In addition to these laws, Ethiopia has adopted a national AML/CFT Policy in April 2019,<sup>107</sup> aimed at combating money laundering in a coordinated manner. The overarching goal of the policy is:

to detect, deter and prevent ML, associated predicate offences and TF; and to protect the integrity of its financial system from illegal activities and illicit financial flows. The Policy sets out policy objectives on all the key pillars of an effective AML/CFT regime such as: strengthening the AML/CFT legal framework; ML investigation, prosecution and confiscation of proceeds of crime; enhancing domestic cooperation and AML/CFT capacity building.<sup>108</sup>

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<sup>103</sup> These powers and functions of the center are reaffirmed under Article 13 of Proclamation No. 780/2013. Awareness improvement in the major areas sought to be improved by the National AML/CFT Policy of Ethiopia, see 4.5.1., p.12.

<sup>104</sup> National Bank of Ethiopia, Customer Due Diligence of Banks Directives No. SBB/46/2010.

<sup>105</sup> Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation, Proc. No. 780/2013, Fed. Neg. Gaz. Year. 19, No. 25. 2013, Art. 57(1). (Hereinafter cited as the AML/CFT Proclamation).

<sup>106</sup> The Financial Intelligence Service Re-Establishment Council of Minister Regulation, 2022, Reg. No 490/2022 (hereinafter referred as the FIS Re-Establishment Regulation)

<sup>107</sup> FDRE, Ministry of Peace, National Anti-Money Laundering and Combating the Financing of Terrorism Policy, April 2019.

<sup>108</sup> ESAAMLG, Anti-money laundering and counter-terrorist financing measures - Ethiopia, 6<sup>th</sup> Follow up Report and Technical Compliance Re-Rating, ESAAMLG, Dar es Salaam, (2019), p. 7.

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This reporting duty and related issues are part of the following sections of this article.

## 5. The Practice in Advocates' Duty to STR in Ethiopia

The laws indicated above embody measures to combat money laundering and financing of terrorism, including the duty of suspicious transactions reporting. In the course of their implementation, FIS receives reports on suspicious transactions from various sources including lawyers/advocates.<sup>109</sup> The following empirical data shows the practice on the ground with regard to the duty of advocates to report suspicious transactions in Ethiopia.

The participants were selected from seven cities/towns (Addis Ababa, Bahir Dar, Bulle Hora, Debre Birhan, Dire Dawa, Hawassa, and Nekemite). Among the participants 91.95% of them are male and the remaining 8.05% are female, the number of female participants is very small because Ethiopia has very few numbers of female advocates. Concerning their age 50% of them are from 31 to 40 and 39.5% of them are between the ages of 41-50. 61.9% of and 35.7% of the respondents are LLB and LLM graduates respectively. 43.53% of the advocates have 5 to 10 years and 28.24% of the advocates have 11-15 years of experience. Considering their academic level and years of experience the responses from advocates can give us insights relating to the effect of the law with lived experience.

In addition to advocates, 71 law instructors have participated as respondents. 87.7% of them are male, and 18.3% are female respondents. 54.4% of the instructors who responded for the questionnaire are between the ages of 31 to 40. The remaining participants between ages 20-30 and 41-50 are 22.1% and 23.5%, respectively. With regard to their academic rank, 63.8% of the respondents are lecturers and 20.3% are assistant professors. The remaining percentage shows the number of assistant lecturers and associate professors, 10.1% and 5.8%, respectively. The response from instructors can provide well-informed views.

In principle, citizens have no duty to report crime subject to certain exceptions. Thus, the majority of jurisdictions attach 'no penalty to simple failure to inform authorities about criminal conduct.'<sup>110</sup> On the other hand, the duty to report on suspicious transactions to the competent authority is

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<sup>109</sup> FIS Re-establishment Regulation No. 490/2022.

<sup>110</sup> Matthew R Hall (1996). "An Emerging Duty to Report Criminal Conduct: Banks, Money Laundering, and the Suspicious Activity Report", *Kentucky Law Journal*: Vol. 84, Issue 3, (1996), pp. 644-645.

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considered –in various countries– as one of the exceptions to the principle.<sup>111</sup> In addition to legislations that oblige reporting, various states have whistle-blower laws to protect individuals who voluntarily report violations of the law.<sup>112</sup>

Reporting of suspicious transactions under the FATF suggests that: “If a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, by law, to report promptly its suspicions to the financial intelligence unit (FIU)”.<sup>113</sup> Recommendation 25 requires adequate feedback to be provided to the financial sector and DNFBPs. “Such feedback helps institutions and businesses to more accurately assess the money laundering and terrorist financing risks and to adjust their risk programmes accordingly”.<sup>114</sup> However, the institutions are responsible neither for determining the type of criminal activity, nor examining the crime’s link with terrorism financing; and the responsibility is left for FIU and law enforcement authorities.<sup>115</sup>

For the effective implementation of the duty to report suspicious transactions, the FATF provides some designated non-financial businesses and professions (DNFBPs) to show customer due diligence and record-keeping while dealing with the following conditions:<sup>116</sup>

- when *casinos* engage in financial transactions equal to or above the applicable designated threshold;
- when *real estate agents* are involved in transactions for their client concerning the buying and selling of real estate;
- when *dealers in precious metals* and *dealers in precious stones* are engaged in any cash transaction with a customer equal to or above the applicable designated threshold;
- when *lawyers, notaries, other independent legal professionals* and *accountants* prepare or carry out transactions for their client concerning activities such as buying and selling of real estate; managing of client money, securities or other assets; management of bank, savings or securities

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<sup>111</sup> Id. p. 645.

<sup>112</sup> Albert D. Clark (1994). “Ethical Implications of Whistle Blowing”, *LA. B.J.* Vol. 42, p. 363.

<sup>113</sup> FATF Recommendations, Recommendation 20.

<sup>114</sup> FATF (2007). *Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing: High Level Principles and Procedures*, p. 7.

<sup>115</sup> Id. P. 8.

<sup>116</sup> FATF Recommendations, Recommendation 22, and Article 2(10)(c) of the Proclamation.

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accounts; organisation of contributions for the creation, operation or management of companies; creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

Moreover, this applies to *trust and company service providers* when they prepare or carry out transactions for a client concerning activities related to:

- acting as a formation agent of legal persons;
- acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;
- providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;
- acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement;
- acting as (or arranging for another person to act as) a nominee shareholder for another person.

Marshet notes that in the absence of comprehensive laws, the launderers – by using the financial sectors and most recently by resorting to designated non-financial businesses and professions (DNFBPs)– try to make their dirty money appear clean or legitimate. Especially in recent times, the DNFBPs are increasingly becoming ‘gatekeepers’ for the launderers who give veneer for the ill-gotten money. This is why the FATF recommendations extended the scope of their measures to prevent and detect money laundering and financing of terrorism by imposing some duties on the DNFBPs.<sup>117</sup>

The FATF provides that all requirements for financial institutions, DNFBPs or Virtual Assets Service Providers (VASPs) should be introduced either in law or other enforceable means, depending upon the discretion of the particular country.<sup>118</sup> The Palermo convention requires states to set obligation to reporting of suspicious transactions<sup>119</sup> However, combating the crime requires extra effort including strengthening of the competent institutions.

In Ethiopia, the institution that is entrusted with this specific mandate is the Financial Intelligence Service (FIS). However, its efforts are limited by the scarcity of trained and qualified professionals in the field, inadequate technical systems and facilities, and low-level awareness of reporting entities

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<sup>117</sup> Marshet, *supra* note 68.

<sup>118</sup> FATF Recommendations, FATF interpretive note, p. 115.

<sup>119</sup> The Palermo Convention, Art. 7.

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and other relevant bodies.<sup>120</sup> Moreover, regional public prosecutors need enhanced competence with regard to examining predicate crimes in light of the Anti-Money Laundering Legal framework.<sup>121</sup>

As member of the Palermo Convention and accepting the recommendations suggested by the FATF, many countries have subjected lawyers, notaries and other independent legal professionals to anti-money laundering measures.<sup>122</sup> Thus, lawyers are required to make suspicious transaction reports (STRs). The Ethiopian anti-money laundering proclamation in the same fashion with that of FATF makes reference to advocates, notaries and other independent legal professionals as one of the designated non-financial businesses and professions (DNFBPs). Thus, Ethiopian law subjects advocates to a duty of reporting suspicious transactions.<sup>123</sup>

Meanwhile, lawyers are prohibited from disclosing about the report or the investigation to their customers or third parties.<sup>124</sup> On the other hand, the lawyers are protected from liability arising from their act of reporting suspicious transactions as a result of professional secrecy laws, if the STR has been made in good faith.<sup>125</sup> However, Article 85(6) of the Federal Advocacy Service Licensing and Administration Proclamation states that failure to keep the confidentiality of client's information is considered as violation of serious disciplinary rules and it can entail fine: Birr 7,500 to 15,000.

If an advocate violates the rule twice in period of five years, his/her license will be suspended for a period of six months to one year.<sup>126</sup> The Advocacy Service Licensing and Administration Proclamation has provided no exception to the rule and this is not in conformity with Article 24 of AML/CFT Proclamation. As new legislation derogates the older one, the AML/CFT Proclamation will have a repealing effect on the preceding proclamation.

FATF recommends that lawyers should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in paragraph (d) of

<sup>120</sup> Tu'emay, *supra* note 50.

<sup>121</sup> Interview with Tekilu Dirbe, Public Prosecutor, Anti-Corruption Directorate of Adama Special Zone, Oromia Region, 30 May 2021.

Interview with Rahimato, Public Prosecutor, Anti-Corruption Directorate of SNNPRS Attorney General, SNNPRS, 30 May 2021.

<sup>122</sup> Marshet, *supra* note 68.

<sup>123</sup> The AML/CFT Proclamation, Art. 17.

<sup>124</sup> *Id.* Art. 20.

<sup>125</sup> *Id.* Art. 24. See also FATF Recommendations, Recommendation 21.

<sup>126</sup> FDRE, the Federal Advocacy Service Licensing and Administration Proclamation, Proc. No. 1249/2021, Fed. Neg. Gaz. Year 27, No. 42, Arts. 85(6), 86(1) and 86(5).

Recommendation 22. This duty is adopted under Article 2(10) of AML/CFT Proclamation of Ethiopia. This means lawyers have no duty to report if the information is acquired while dealing with court proceedings or active cases. As Zerehun noted, this mechanism is availed to protect the rights of lawyers and clients.<sup>127</sup> Eyuel argues that, the terms ‘suspicious transaction’ should be narrowly interpreted so as to protect the right of the duty bearer.<sup>128</sup>

The DNFBPs Directive defines suspicious transaction and states various circumstances of business dealing that might lead to suspicion:<sup>129</sup>

‘Suspicious Transaction’ means one which is unusual because of its size, volume, type or pattern or otherwise suggestive of known money laundering, predicate offense or terrorist financing methods and includes: Transactions or patterns of transactions that is inconsistent with a customer's known, legitimate business or personal activities or normal business for that type of account or that lacks an obvious economic rationale; transactions involving high-risk categories vulnerable to money laundering, predicate offenses or terrorist financing; transactions involving shell companies...

Ethiopia has made substantial improvements in its legal framework and in financial institution compliance, designated nonfinancial businesses and professions. However, the country is highly vulnerable to money laundering and terrorism financing.<sup>130</sup> We can see the poor system of STR administration as one means of such lack of improvement in practice.<sup>131</sup> Such deficiency is also raised by Biniam who stated that the center has enacted a directive on the area but it is not in a position to implement it.<sup>132</sup> Biniam notes the need for enhancing the knowledge of the professionals on the subject matter.<sup>133</sup> On the other hand, Abi says the FIS is working to improve the awareness of the

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<sup>127</sup> FGD, Zerehun Waza, former SNNPRS Supreme Court Judge and Instructor of Law, Hawassa, 30 May 2021.

<sup>128</sup> FGD, Eyuel Ewinetu, Legal Advisor and Expert on Ethiopian Business Laws, Addis Ababa, 30 May 2021.

<sup>129</sup> FIC of FDRE, Designated Non-Financial Business And Professions' Anti-Money Laundering And Countering The Financing Of Terrorism Compliance Directives No., 02/2016, Art. 2(22)

<sup>130</sup> Shetret *et. al.*, *supra* note 48, p. ix

<sup>131</sup> FGD, Wondwosen Hrp0, Legal Advisor and Expert on Ethiopian Business Laws, Addis Ababa, 30 May 2021.

<sup>132</sup> Interview via phone, with Biniam Shiferaw, AML/IFFs Consultant, Tana Copenhagen AML/IFFs Capacity Support Project-Ethiopia, 10 June 2021, Addis Ababa.

<sup>133</sup> *Ibid.*

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lawyers through different trainings admitting their deficiency with regard to reaching more lawyers.<sup>134</sup> Her views are supported by Lelo's observations.<sup>135</sup>

The effective dissemination of law is significant to achieve the expected result. Among the participants, 34.48% of the advocates and 62% of law instructors said they did not know the fact that advocates are required to make reports on suspicious transactions under the Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation. The response from law instructors is fairly similar.

These figures reveal that, FIS should work on awareness enhancement among the members of the legal profession. Law schools are expected to include money laundering offences as part of the existing criminal law course and the FIS should provide short term trainings for the advocates.<sup>136</sup> This is one of the responsibilities of FIS under the proclamation.<sup>137</sup> 77% of advocates and 77.5% of law instructors suggested the need for short term training for practicing lawyers. Likewise, 51.72% of lawyers and 88.7 of law instructors suggested the importance of teaching money laundering as part of the existing criminal law course for law school students. The survey reveals that only 4.76% of advocates and 4.2% of law instructors have conducted a research on the area of AML/CFT, and this indicates the need for enhanced engagement in research relating to the theme.

The other issue that needs discussion is whether the duty of advocates to report to the FIS as required under the law is necessary, and whether public prosecutors have experience in instituting a case against lawyers for their non-compliance to the duty. Concerning necessity of STR, 92.9% of the advocates and 97.2% of the law instructors agree with the necessity of STR to combat money laundering in Ethiopia. 1.17% of the advocates said they have reported suspicious transaction to FIS compared to 8.23% who encountered the crimes and suspected it but failed to report to the center. A respondent<sup>138</sup> says they

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<sup>134</sup> Interview via phone, with Abi Dinka, FIC Legal and International Relations Team Leader, 10 June 2021, Addis Ababa.

<sup>135</sup> Interview via phone, with Lelo Workineh, FIC, Report Receiving Department, 25 June 2021, Addis Ababa.

<sup>136</sup> The Advocacy Service Licensing and Administration Proclamation requires 24 to 30 hours of training in the field of law in a given year. The issue at hand can be made part of this training scheme. As provided under Article 25 of the Proclamation the objective of the training is to enable Advocates acquire up-to-date knowledge and excellence to discharge their professional responsibility.

<sup>137</sup> AML/CFT Proclamation, Art. 13(2).

<sup>138</sup> Interview, 30 May 2021.

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did not report because they did not want to lose their livelihood and benefits thereon. This line of argument was forwarded by two other respondents.<sup>139</sup>

Biniyam noted that the activities listed under the proclamation are not as such fit with our country's reality because they are handled either by the capital owners themselves or close relatives of the capital owner.<sup>140</sup> There are advocates who said that the experts at the Financial Information Service are not yet in a position to receive reports from advocates; rather they are delivering trainings for them to enhance awareness on the issue but the training is confined in Addis Ababa. Their major source of report is from Commercial Banks.<sup>141</sup>

On the other hand, the public prosecutors have no experience with regard to instituting a case against lawyers for failure to report suspicious transaction. They focus on the predicate crimes when there is prosecution.<sup>142</sup> This finding is in line with the absence of cases instituted against lawyers for breaching the confidentiality duty at Advocated License and Administration Directorate of Ministry of Justice, and this is also observed in SNNPRS and Sidama Regions.<sup>143</sup> Public prosecutors and judges, with more than ten years of work experience, have confirmed that they have never encountered with cases involving such duty.<sup>144</sup>

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<sup>139</sup> FGD, 30 May 2021.

<sup>140</sup> Interview with Biniyam, *supra* note 132.

<sup>141</sup> Interview with Lelo *supra* note 135.

<sup>142</sup> FGD, Zerehun, *supra* note 127; Interview with Tekilu *supra* note 124; Interview with Rahimato *supra* note 121.

<sup>143</sup> Interview with Ashebir Addisu, SNNPRS, Justice Bureau, Advocates and Civic Associations License and Administration Directorate Director, Hawassa, 24 August 2023. Interview with Reta Nigat, Ministry of Justice, Advocates License and Administration Directorate, Public Prosecutor, 29 August 2023.

<sup>144</sup> Interview with Abebe Zelalem, Public Prosecutor, Ministry of Justice, Addis Ababa, 28 August 2023; Interview with Dereje Dest, Public Prosecutor, Justice Bureau, SNNPRS, Hawassa, 24 August 2023; Interview with Tekilu Deribe, Public Prosecutor, Oromia Region Justice Bureau, Adama, 31 August 2023; Interview with Tsegaye Assefa, Judge, SNNPRS Supreme Court (former judge of Hawassa City first instance and High Courts), Hawassa, 31 August 2023; Interview with Akimel Ahimedin, Judge, SNNPRS Supreme Court (former judge of Silte Zone Courts), Hawassa, 31 August 2023.

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## 6. Compatibility of STR Duty with Legally Protected Rights

The duty of legal professionals to report suspicious transactions “has been fiercely assailed and has raised tremendous challenges from legal communities in several countries”.<sup>145</sup> The contention states that the obligation is contrary to the legal professional privilege, confidentiality, professional freedom of the lawyers and fair trial. On the contrary, others have argued that confidentiality should not be raised as a defense for money laundering activities; and lawyers should not be allowed to keep the criminal activities as a secret under the guise of professional secrecy.<sup>146</sup> This line of argument is supported by various international anti-laundering regimes through assigning them as gatekeepers by requiring them to take certain due diligence measures and actively cooperate with the state.<sup>147</sup>

As indicated earlier, the role of legal professionals under the FATF regime entails, broadly speaking, two types of functions: the relatively passive role of conducting due diligence and the role of active cooperation with the state, which is the duty to report suspicious transactions.<sup>148</sup> In various states – including EU and several other member states of the FATF– “lawyers’ gatekeeping role, including the duty for active cooperation with the state, has been transposed into national legislation more or less automatically”.<sup>149</sup> This state practice shows that the duty is becoming an exception to the concepts of confidentiality and professional privilege.

According to the respondents in this research, 84.7% of advocates and 93% of the law instructors believe that the STR duty affects certain rights of the lawyer/client. These rights include the duty of confidentiality, the relationship of trust between lawyers and client, legal professional privilege, professional freedom of the lawyers and fair trial which are under threat because of the legally provided duty to report suspicious transactions.

During a Focus Group Discussion there was the view that STR amounts to spending your money to recruit a spy who works against your interest.<sup>150</sup> On the other hand, there was the view that reporting a crime helps to protect the interest of the society and avert its drastic effect on the economy of the state. According to this view, reporting a crime should be implemented by the

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<sup>145</sup> Paton, Cited in Marshet, *supra* note 76.

<sup>146</sup> Marshet, *supra* note 68.

<sup>147</sup> Nathanael Tilahun, *supra* note 71, p. 281.

<sup>148</sup> FATF Recommendations, paras. 22–23. See also Nathanael Tilahun, *supra* note 75, pp. 97–110.

<sup>149</sup> Nathanael, *supra* note 71, p. 283.

<sup>150</sup> FGD, Zerehun, *supra* note 127.

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authorities as a legitimate limitation against the rights.<sup>151</sup> The advocates and instructors (61.62% and 84.5%, respectively) support the reporting duty when there is a contradiction with the rights. 85.9% of the respondents have preferred the STR mainly owing to public interest protection.

It is undeniable that the role of the protection afforded to legal professional privilege aims at ensuring the right to a fair trial and the right to privacy recognised under international and regional human rights instruments.<sup>152</sup> However, we should not be harmed by the impacts of money laundering and financing of terrorism under the guise of the protection accorded.<sup>153</sup> And, exempting lawyers “from STR requirement would create a substantial gap in AML/CFT legal framework”.<sup>154</sup> Thus, we need to understand that the protections are available to protect legitimate interests of individuals, which does not justify escaping liability for the offences because advocates have responsibility not only to their clients but to the legal profession and society as well.

## 7. Conclusion and the Way Forward

Reducing illicit financial flow is part of the major objectives to ensure the United Nations’ Sustainable Development Goals.<sup>155</sup> Anti-Money Laundering measures have various objectives, including: removing profit out of crime through confiscation,<sup>156</sup> detecting crime by following source of the money, identifying and following up professional launderers so as to prevent them from benefitting from the proceeds of their crime, and protecting the integrity of the financial system against offenders.

As discussed in the preceding sections, one of the measures in this regard is the duty to report suspicious transactions. Because of such reporting duty, the Ethiopian Financial Intelligence Service has received reports of suspicious transactions involving 9 Billion Birr within five months in 2014 E.C (i.e. September 2021 to January 2022).<sup>157</sup> Advocates are one of DNFBPs with the

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<sup>151</sup> FGD, Eyouel, *supra* note 128.

<sup>152</sup> Mesay, *supra* note 81, p.20.

<sup>153</sup> Marshet, *supra* note 68.

<sup>154</sup> Mesay, *supra* note 81, p.20.

<sup>155</sup> UNODC, “UNODC and the Sustainable Development Goals”. Vienna, (2015).

<sup>156</sup> Mariano-Florentino Cuellar (2002-2003). “The Tenuous Relationship between the Fight against Money Laundering and the Disruption of Criminal Finance”, *J. Crim. L. & Criminology*, Vol. 93, Nos. 2-3, p. 311.

<sup>157</sup> Endale Assefa, Communication Director, Ethiopian Financial Intelligence Service, Ethiopian News Agency, 15 March 2022, available at <https://www.press.et/ama/?p=68704> accessed on 16 March 2022

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duty to report suspicious transactions. However, the law does not deny protection for the advocates if the information has been obtained in the course of ascertaining the legal position of clients and in the course of representing or defending clients in judicial, administrative, arbitration or mediation proceedings.<sup>158</sup>

Advocates are required to report suspicious transactions if the act is among the activities mentioned under the law. These are: buying and selling of real estate; managing of client money, securities or other assets; management of bank or securities accounts; organization of contributions for the creation, operation or management of companies; creation, operation or management of legal persons or arrangements; and buying and selling of business entities.<sup>159</sup> In other words, advocates are not obliged to make the report unless the suspicious act is related with these listed dealings.

With regard the practice in Ethiopia highlighted above, legal instruments, opinion of experts and scholarly works show that the duty of advocates to report suspicious transaction is in line with legally protected rights. This conclusion is based on the inquiry into the impact of money laundering on the economy, integrity of financial institutions, rule of law; democracy and social well-being of the world in general and the countries in particular. Advocate's duty to report suspicious transactions provided under Ethiopia's AML/CFT Proclamation is in line with the state's duty agreed under Article 15 of the Palermo Convention and other international instruments. Moreover, it is in conformity with widely accepted legal requirement in various countries.

It is to be noted that the duty to report suspicious transactions is designed to protect peace, security, the economy and social wellbeing and it does not encroach upon legitimate entitlements (such as fair trial rights, professional privilege, the duty of confidentiality; professional freedom of the lawyers and the relationship of trust between lawyers and client) because these rights are meant to protect legitimate interests of individuals, and not to hide a crime, escape criminal liability or to encourage impunity.

With regard to the way forward, the Financial Intelligence Service needs to work towards the enhancement of awareness on the area among the legal community, including extending its activities in regional administrations. The institution is also expected to develop a better reporting mechanism that encourages advocates to report suspicious transactions. The need for enhanced awareness of Ethiopia's AML/CFT legal regime also requires

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<sup>158</sup> AML/CFT Proclamation, Art. 7(2).

<sup>159</sup> Id. Art. 2(10)(c).

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efforts of Ethiopian law schools to fill the knowledge gap on the area through covering themes relating to the offence of money laundering under criminal law course syllabus and encouraging students to conduct research on the area. Meanwhile, the need for consistency of laws requires an exception to the rule either under a regulation that might be enacted in the near future –following the Federal Advocacy Service Licensing and Administration Proclamation No. 1249/2021– or possible amendments to the proclamation. \_\_\_\_\_■

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